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No. 94-1515

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

IN RE: PUBLIC SERVICE COMPANY
OF NEW HAMPSHIRE,
Debtor.

MARTIN ROCHMAN, EDWARD KAUFMAN
AND ROBERT C. RICHARDS,
Petitioners,

v.

PUBLIC SERVICE COMPANY OF
NEW HAMPSHIRE, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENTS PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE AND THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

John B. Nolan
Counsel of Record
Steven M. Greenspan
Gary M. Becker
Kent I. Scott-Smith
Day, Berry & Howard
CityPlace I
Hartford, CT 06103-3499
(203) 275-0100

Howard J. Berman
Greenberg, Traurig, Hoffman,
Lipoff, Rosen & Quentel
153 East 53rd Street
New York, NY 10022

Attorneys for Respondents Public Service Company of New Hampshire and the Official Committee of Equity Security Holders

QUESTION PRESENTED

Whether The United States Court Of Appeals For The First Circuit Correctly Concluded That Petitioners, Who Actively Participated In The Chapter 11 Reorganization Case, Were Properly Precluded From Relitigating In A Later Civil Action Issues Which Were Or Could Have Been Litigated In The Bankruptcy Case.

LIST OF PARENT, SUBSIDIARY AND AFFILIATE COMPANIES

Public Service Company of New Hampshire is a wholly-owned subsidiary of Northeast Utilities, a public utility holding company. Public Service Company of New Hampshire has no subsidiaries. Northeast Utilities has issued shares and debt securities to the public. The following subsidiaries of Northeast Utilities have issued shares or debt securities to the public:

The Connecticut Light and Power Company
Western Massachusetts Electric Company
The Holyoke Water Power Company
Public Service Company of New Hampshire
North Atlantic Energy Company.

Other entities with publicly-held securities in which Northeast Utilities and/or Public Service Company of New Hampshire have an interest that Rule 29.1 of the Rules of the Supreme Court of the United States may require to be disclosed are:

Connecticut Yankee Atomic Power Company
Maine Yankee Atomic Power Company
Vermont Yankee Nuclear Power Corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARENT, SUBSIDIARY AND AFFILIATE COMPANIES	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
A. Introduction and Summary	1
B. Relevant Facts and Proceedings	4
ARGUMENT	13
The Court Of Appeals Correctly Concluded That Petitioners, Who Actively Participated In The Chapter 11 Reorganization Case, Were Properly Precluded From Relitigating In A Later Civil Action Issues Which Were Or Could Have Been Litigated In The Bankruptcy Case	13
CONCLUSION	20

TABLE OF AUTHORITIES

CASES

Dale C. Eckert Corp. v. Orange Tree Assocs., Ltd. (In re Orange Tree Assocs., Ltd.), 961 F.2d 1445 (9th Cir. 1992) 15, 19

Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394 (1981) 16

Henderson v. Kibbe, 431 U.S. 145 (1977) 16

Kalb v. Feuerstein, 308 U.S. 433 (1940) 14

Kaufman v. Public Serv. Co. (In re Public Serv. Co.), 43 F.3d 763 (1st Cir. 1995) 3, 12, 15 19

In re Longardner & Assocs., Inc., 855 F.2d 455, 460 (7th Cir. 1988) 15

Manges v. Seattle-First Nat'l Bank (In re Manges), 29 F.3d 1034 (5th Cir. 1994), *cert. denied*, __ U.S. __, 115 S. Ct. 1105 (1995) 18

Marine Harbor Properties, Inc. v. Manufacturers Trust Co., 317 U.S. 78, 83 (1942) 14

In re Newport Harbor Assocs., 589 F.2d 20, 22 (1st Cir. 1978) 15

In re Public Serv. Co., 114 B.R. 820 (Bankr. D.N.H. 1990) 7

In re Public Serv. Co., No. 90-272-D, slip op. (D.N.H. Aug. 21, 1991) 8

Public Serv. Co. v. Consolidated Utils. & Communications, Inc., 846 F.2d 803 (1st Cir. 1988) 6, 15

Public Serv. Co. v. Richards (In re Public Serv. Co.), 148 B.R. 702 (Bankr. D.N.H. 1992) . 3, 5, 6 7, 10, 11 17, 18, 19

Richards v. Public Serv. Co. (In re Public Serv. Co.), 848 F. Supp. 318 (D.N.H. 1994) . . 3, 12, 16 18, 19

Rochman v. Northeast Utils. Serv. Group (In re Public Serv. Co.) 963 F.2d 469 (1st Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 304 (1992) 6, 9, 16

Trustees of Somerset Academy v. Picher, 90 F.2d 741 (1st Cir.), *cert. denied*, 302 U.S. 737 (1937) 16

U.S. Bancorp Mort. Co. v. Bonner Mall Partnership, __ U.S. __, 115 S. Ct. 386 (1994) 18

Yell Forestry Prods., Inc. v. First State Bank, 853 F.2d 582 (8th Cir. 1988) 18

STATUTES

U.S. Const. art. I, § 8, cl. 4 14

11 U.S.C. § 362 14

11 U.S.C. § 501 15

11 U.S.C. § 1125 . . . . . 2, 5, 6, 8, 15, 18

11 U.S.C. § 1144 . . . . . 8, 15, 18

N.H. Rev. Stat. Ann. § 362-C:2 (Supp. 1993) . . . 5

MISCELLANEOUS

H.R. Rep. No. 95-595, 95th Cong., 2d Sess. 61 (1978), *reprinted in*, 1978 U.S.C.C.A.N. 5787, 5847 14

Fed. R. Bankr. P. 3002(a) 15

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STATEMENT OF THE CASE

A. *Introduction and Summary*

On April 1, 1992, Public Service Company of New Hampshire ("PSNH") and the Official Committee of Equity Security Holders ("Equity Committee") (collectively, the "Respondents") commenced an adversary proceeding in the United States Bankruptcy Court for the District of New

Hampshire seeking declaratory and injunctive relief against Robert C. Richards, Edward Kaufman and Martin Rochman (collectively, the "Petitioners"). PSNH was and is a reorganized debtor under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code"). Petitioners were common shareholders of PSNH who had prosecuted numerous, unsuccessful legal and regulatory challenges to the confirmed Third Amended Joint Plan of Reorganization for PSNH (the "Plan"). After consummation of the Plan, but prior to the closure of the bankruptcy case, Petitioners threatened to commence a fraud and federal securities action against certain proponents of the Plan and their advisors.

In its Amended Memorandum Opinion dated October 19, 1992 ("Amended Memorandum Opinion") and November 3, 1992 Judgment ("Judgment"), the Bankruptcy Court concluded that because the Third Amended Disclosure Statement (the "Disclosure Statement") had been approved by the Bankruptcy Court pursuant to Section 1125(b) of the Bankruptcy Code, the Plan had been found to have been proposed in good faith and the proponents of the Plan had been found to have been in compliance with the applicable provisions of Chapter 11 of the Bankruptcy Code, the doctrine of *res judicata* and Section 1125(e) of the Bankruptcy Code absolved the proponents and any party involved in the solicitation of the acceptance of the Plan from liability for any violation of any applicable law. (Judgment at 4, ¶ 2). Accordingly, the Judgment permanently enjoined Petitioners, their attorneys, agents, heirs, assigns or representatives from commencing the action they had threatened. (Judgment at ¶ 5).

Notwithstanding the injunction, on November 24, 1992, Richards, on behalf of John G. Mascioni, Trustee

("Mascioni"),[1] filed a complaint in the United States District Court for the Southern District of New York (the "Southern District Complaint") asserting the precise claims previously threatened by Petitioners and expressly considered, rejected and enjoined by the Bankruptcy Court. By order dated January 23, 1993 (the "Order of Contempt"), the Bankruptcy Court, after a full hearing, held Richards and Mascioni in contempt and ordered them immediately to cause the Southern District Complaint to be withdrawn. *Public Serv. Co. v. Richards (In re Public Serv. Co.)*, 148 B.R. 702, 706-07 (Bankr. D.N.H. 1992).

Both the Bankruptcy Court Judgment and Order of Contempt were affirmed by the United States District Court for the District of New Hampshire, *Richards v. Public Serv. Co. (In re Public Serv. Co.)*, 848 F. Supp. 318, 328 (D.N.H. 1994). The United States Court of Appeals for the First Circuit affirmed the Bankruptcy Court Judgment. *Kaufman v. Public Serv. Co. (In re Public Serv. Co.)*, 43 F.3d 763, 769 (1st Cir. 1995).[2]

Despite their active participation in the Bankruptcy Court proceedings, Petitioners ask this Court to permit them to relitigate in a civil action issues which were or could have been litigated in the Bankruptcy Court. Petitioners ignore the longstanding policy in favor of finality and conclusiveness of

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[1] Mascioni had been a common shareholder of PSNH and contributed financially to Petitioners' attacks on the Plan. *See Richards v. Public Serv. Co. (In re Public Serv. Co.)*, 848 F. Supp. 318, 323 (D.N.H. 1994).

[2] Petitioners abandoned their appeal from the Order of Contempt at the Court of Appeals. *See Kaufman v. Public Serv. Co. (In re Public Serv. Co.)*, 43 F.3d 763, 765 (1st Cir. 1995).

prior adjudications but offer no valid reason for the Court to make an exception to this fundamental tenet of civil litigation. The rules of law advocated by Petitioners have never been adopted by any court and, in any event, have no application and are contrary to the facts and equities of this case. In short, Petitioners have identified no reason for the Court to review this case.

B. *Relevant Facts and Proceedings*

Although the PSNH bankruptcy case has had a lengthy and tortuous procedural history involving multiple proceedings before numerous courts and administrative agencies, including denials of two other petitions for certiorari filed by Petitioners, this final chapter is straightforward. The various stages of the saga are recounted below.

(i) *The Reorganization Proceedings*

Principally as a result of severe financial problems stemming from its investment in the Seabrook Station nuclear power plant, PSNH filed for protection under Chapter 11 of the Bankruptcy Code on January 28, 1988. Given the substantial public interest involved in the level of utility rates to be established for the reorganized PSNH, the Bankruptcy Court authorized the State of New Hampshire to intervene in the bankruptcy proceedings. (Order on Pending Motions Re Party Status and Intervention dated June 22, 1988). On November 22, 1989, the State and Northeast Utilities Service Company ("NUSCO"), a subsidiary of Northeast Utilities ("NU"), entered into an agreement (the "Rate Agreement") that established a rate structure allowing PSNH to raise retail customer rates by 5.5%

in each of the seven successive years and enabling PSNH to recoup some, but not all, of its investment in Seabrook.[3]

The Rate Agreement was a key element of the Plan, which, with the Disclosure Statement, was filed on December 28, 1989 by PSNH, NUSCO, the Equity Committee and other creditors and parties in interest after extensive hearings in the Bankruptcy Court pursuant to Section 1125 of the Bankruptcy Code. As described by the Bankruptcy Court, the Plan was "the 'surviving plan' from a competitive bidding process between four major regional utilities interested in acquiring PSNH that took place during a series of disclosure statement hearings. . . ." *Public Serv. Co. v. Richards*, 148 B.R. at 706-07.

The Plan provided for the acquisition of PSNH by NU in a two-step process, each step contingent upon approval by governing regulatory agencies.[4] Step one occurred on May 16,

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[3] The Rate Agreement was negotiated by the Governor and the Attorney General of New Hampshire and then approved by the legislature. *See* N.H. Rev. Stat. Ann. § 362-C:3 (Supp. 1993).

[4] Petitioners have not limited their challenges to the Plan to the federal courts. They also launched collateral attacks on the Plan in the regulatory arena, seeking to intervene in proceedings at the New Hampshire Public Utilities Commission ("NHPUC") and the Federal Energy Regulatory Commission ("FERC"). Petitioners' Motion to Intervene in the FERC proceedings was denied. After their motion to intervene in the NHPUC proceeding was also denied, Petitioners took the unusual step of filing a Writ of Prohibition in the New Hampshire Supreme Court seeking to enjoin the NHPUC proceedings. That Writ was denied by the New Hampshire Supreme Court on June 18, 1990. When the NHPUC approved the Rate Agreement, Petitioners challenged the NHPUC's findings by appeal to the New Hampshire Supreme Court and a petition for a writ of certiorari to this Court. The appeal was dismissed for lack of standing and this Court denied certiorari.

1991, after the order approving the Rate Agreement by the NHPUC became final, when distributions of cash and securities were made to PSNH's creditors and equity security holders. Step two occurred on June 5, 1992, after the FERC approved the merger of PSNH with NUSCO. Consummation of the Plan resulted in the distribution of approximately $2.3 billion of value to prepetition holders of PSNH claims and interests. Numerous "complex" financing arrangements were required to complete the reorganization and finance the distributions. *See Rochman v. Northeast Utils. Serv. Group (In re Public Serv. Co.)*, 963 F.2d 469, 474 (1st Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 304 (1992).

Overruling the objections of Rochman and Richards, the Bankruptcy Court approved the Disclosure Statement on January 3, 1990 after a final hearing, finding that the Disclosure Statement "contained adequate information within the meaning of Section 1125 of the Bankruptcy Code."[5] (Order Approving Third Amended Disclosure Statement dated January 3, 1990, at 1-2). No appeal was taken from the order approving the Disclosure Statement. Rather, as recounted by Bankruptcy

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For a description of Petitioners' challenges to the Plan through October, 1992, *see Public Serv. Co. v. Richards*, 148 B.R. at 706-09.

[5] Section 1125(a)(1) of the Bankruptcy Code defines "adequate information" with respect to a disclosure statement as "information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan...." To meet the "adequate disclosure" requirement under Section 1125(a)(1), a disclosure statement need not comply with the disclosure standards of the federal securities laws. *Public Serv. Co. v. Consolidated Utils. & Communications, Inc.*, 846 F.2d 803, 808 (1st Cir. 1988)

Judge Yacos in the Amended Memorandum Opinion, Petitioners then embarked on a veritable crusade against the Plan and its proponents. *Public Serv. Co. v. Richards*, 148 B.R. at 706-09, 716. After the Disclosure Statement was approved, Rochman and Richards filed an Application for an Order Amending the Disclosure Statement, an *ex parte* application seeking to restrain the transmission of the Disclosure Statement and their motion to "summarily reject" the Plan. Each motion was denied and no appeals were taken. *See Public Serv. Co. v. Richards*, 148 B.R. at 706-07.

On February 23, 1990, Petitioners filed objections to confirmation of the Plan, which they supplemented on March 16, 1990. These objections focused on three separate themes: (a) the Disclosure Statement misrepresented the legal standards applicable to a rate case before the NHPUC; (b) greater value could have been realized for the common stockholders of PSNH by a litigated rate case before the NHPUC as opposed to the Rate Agreement embodied in the Plan; and (c) the Plan was "unfair" to the holders of PSNH common stock. With slight variation, Petitioners have repackaged and reargued the three themes in all of the courts below.

On April 20, 1990, after six days of contested hearings largely devoted to Petitioners' objections,[6] the Bankruptcy Court entered its order confirming the Plan (the "Confirmation

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[6] During the confirmation hearing before the Bankruptcy Court, the Plan's proponents presented the testimony of several expert witnesses concerning utility operations, accounting methods and rate-making case procedure. Each expert was extensively cross-examined by Petitioners. Other than Richards himself, who testified in opposition to the Plan, Petitioners presented no witnesses of their own. *In re Public Serv. Co.*, 114 B.R. 820, 822 (Bankr. D.N.H. 1990).

Order"). The Confirmation Order, accompanied by a comprehensive memorandum of opinion overruling Petitioners' objections, concluded that "the rate increase results under the Rate Agreement represents a fair and equitable settlement and compromise well within the range of results reasonably expectable in a litigated rate case." (Confirmation Order at 12, ¶ 28). Additionally, Judge Yacos specifically found that the Plan had been proposed in "good faith and not by any means forbidden by law," (Confirmation Order at 3, ¶ 4), and that "Proponents [had] engaged in post-petition disclosure and solicitation in good faith and in compliance with the applicable provisions of Section 1125." (General Findings of Fact and Conclusions of Law re Plan Confirmation Issues, ¶ 47). Petitioners filed a timely appeal from the Confirmation Order with the District Court.

On January 17, 1991, nearly nine months after the Bankruptcy Court confirmed the Plan, Petitioners filed a Request for Revocation of Confirmation Order, claiming that the Confirmation Order had been procured by fraud. By Order dated February 20, 1991, the Bankruptcy Court dismissed Petitioners' request on the ground that the applicable limitation period contained in Section 1144 of the Bankruptcy Code precluded actions to revoke confirmation not brought within 180 days after the entry of the Confirmation Order. Petitioners never appealed from that Order.

On August 21, 1991 and August 22, 1991, respectively, the District Court issued a Memorandum Opinion and entered Judgment affirming the Bankruptcy Court's Confirmation Order. *In re Public Serv. Co.*, No. 90-272-D, slip. op. (D.N.H. Aug. 21, 1991). On September 13, 1991, Petitioners appealed from the Judgment of the District Court to the United States Court of Appeal for the First Circuit, which dismissed the appeal on

May 6, 1992, noting that the Plan had been implemented on May 17, 1991 and finding that Petitioners had failed to seek with diligence a stay of the Confirmation Order. *Rochman v. Northeast Utils Serv. Group*, 963 F.2d at 473. Petitioners' petition for a writ of certiorari was denied by this Court. *Rochman v. Northeast Utils. Serv. Co.*, __ U.S. __, 113 S. Ct. 304 (1992).

(ii) *The Adversary Proceeding*

By letter dated March 6, 1992, Petitioners advised counsel to PSNH and NUSCO and counsel to the Equity Committee of their intention to commence an action based on theories of common law fraud and violations of the Securities Exchange Act of 1934 against the State of New Hampshire, NU, NUSCO, all members of the Equity Committee except Rochman and certain attorneys and advisors to those entities. As alleged in a draft complaint enclosed with the March 6, 1992 letter, Petitioners' threatened action was based solely on two claimed misrepresentations of law and fact allegedly contained in the Disclosure Statement: (a) failure to describe accurately certain principles of New Hampshire rate-making law; and (b) failure to disclose the value of the Plan to common stockholders if the merger did not occur and the value of the merger to PSNH ratepayers and NU. Both claims had, however, been previously advanced to, and rejected by, the Bankruptcy Court.

On April 1, 1992, in response to Petitioners' threats, PSNH and the Equity Committee commenced this adversary proceeding to enjoin Petitioners, their attorneys, agents and representatives from commencing any civil action challenging the adequacy of the Disclosure Statement or the solicitation of acceptance of the Plan. PSNH and the Equity Committee also

sought a declaratory judgment that the Bankruptcy Court's findings in the Confirmation Order of "good faith" and compliance with the applicable provisions of Chapter 11 of the Bankruptcy Code absolved any party involved in the solicitation of acceptance of the Plan from liability for any violation of any applicable law. *See Public Serv. Co. v. Richards*, 148 B.R. at 704.

On April 15, 1992, the Bankruptcy Court, on consent, entered a temporary restraining order barring Petitioners from commencing the threatened action or any similar action. *Id.* at 709. Thereafter, the parties filed cross-motions for summary judgment, upon which the Bankruptcy Court, after a full hearing, issued its Amended Memorandum Opinion concluding that a permanent injunction and a declaratory judgment should be entered against Petitioners. *Id.* at 720. In the Amended Memorandum Opinion, the Bankruptcy Court found that the Plan proponents were insulated from the threatened litigation by the provisions of Section 1125(e) of the Bankruptcy Code and the preclusive effect of the final orders in the bankruptcy case. *Public Serv. Co. v. Richards*, 148 B.R. at 720. Judgment entered on November 3, 1992, specifically enjoining Petitioners from commencing any action challenging, directly or indirectly, the adequacy of the Disclosure Statement, the Confirmation Order or the solicitation of acceptance of the Plan.

(iii) *The Southern District Complaint and The Contempt Proceeding*

Despite the Bankruptcy Court's Amended Memorandum Opinion and Judgment, Richards, acting as attorney for Mascioni, commenced a class action on November 24, 1992 in the United States District Court for the Southern District of New York. The action was purportedly brought on behalf of Mascioni and all other former common shareholders of PSNH, except Petitioners, against NU, NUSCO, two of its employees, William B. Ellis and Robert E. Busch, and their counsel. The allegations of the Southern District Complaint were virtually identical to those set forth in the threatened complaint attached to Petitioners' March 6, 1992 letter. *See Public Serv. Co. v. Richards*, 148 B.R. at 704.

On December 16, 1992, PSNH filed a Motion for Order of Contempt against Richards and Mascioni. After an evidentiary hearing in which the Bankruptcy Court found that Mascioni was merely an instrumentality used by Richards to pursue the litigation, the Bankruptcy Court held Richards and Mascioni in contempt and issued an Order of Contempt directing them immediately to withdraw the Southern District Complaint.[7] On January 29, 1993, Richards and Mascioni filed a notice of appeal from the Order of Contempt, which was subsequently consolidated with the appeal from the November 3, 1992 Judgment.

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[7] On February 1, 1993, the Southern District Complaint was dismissed, without prejudice.

On March 31, 1994, the United States District Court for the District of New Hampshire affirmed the Bankruptcy Court's Judgment and Order of Contempt. *Richards v. Public Serv. Co. (In re Public Serv. Co.)*, 848 F. Supp. 318, 328 (D.N.H. 1994). Petitioners having abandoned their appeal from the Order of Contempt, the First Circuit affirmed the Bankruptcy Court Judgment on January 6, 1995. *Kaufman v. Public Serv. Co. (In re Public Serv. Co.)*, 43 F.3d 763, 769 (1st Cir. 1995).

ARGUMENT

The Court Of Appeals Correctly Concluded That Petitioners, Who Actively Participated In The Chapter 11 Reorganization Proceedings, Were Properly Precluded From Relitigating In A Later Civil Action Issues Which Were Or Could Have Been Litigated In The Bankruptcy Court.

Seemingly undaunted by the unbroken string of adverse rulings and the preclusive effects flowing therefrom, Petitioners, yet again, press on in their pursuit to peddle their view that the Bankruptcy Court, and presumably the other courts that have reviewed the orders of the Bankruptcy Court, had been "fooled" by the proponents of the Plan. Despite their assertions to the contrary, Petitioners' claims present no novel issue of law or distinct factual circumstance warranting a break with well-established precedent. Rather, the facts of this case demand that Petitioners be precluded from bringing repetitious and abusive litigation.

Petitioners' active involvement in the reorganization proceedings, including their persistent challenges to the Plan and Disclosure Statement, is undisputed and well documented by the record in this case. Each court that has considered Petitioners' claims has noted one undeniable truth — that Petitioners' threatened litigation seeks to draw this case down a road previously traveled. The March 6, 1992 draft complaint, like the Southern District Complaint, is based on claimed misrepresentations of law and fact that had been previously considered and at least twice rejected by the Bankruptcy Court. Petitioners, however, offer no explanation why the Bankruptcy Court's prior determinations should be considered anew in

another forum, contrary to the express provisions and recognized goals of the Bankruptcy Code and principles of finality and conclusiveness of prior adjudications.

As this Court has previously stated, the United States Constitution grants Congress the exclusive power to regulate bankruptcy, including the right to vest jurisdiction over bankruptcy proceedings exclusively in one forum and to withdraw that jurisdiction from all other forums. *Kalb v. Feuerstein*, 308 U.S. 433, 439 (1940).[8] "The federal bankruptcy power is, of course, paramount and supreme and may be so exercised by Congress as to exclude every competing or conflicting proceeding in state or federal tribunals." *Marine Harbor Properties, Inc. v. Manufacturers Trust Co.*, 317 U.S. 78, 83 (1942) (citing *Kalb v. Feuerstein*, 308 U.S. 433 (1940)).

In exercising its bankruptcy power, Congress has enacted the Bankruptcy Code, which sets forth a detailed statutory scheme for the enforcement of the rights of creditors and holders of interests, such as Petitioners. Participation in the bankruptcy process is mandatory and the exclusive method by which a holder can assert a claim or interest against the estate. *See* H.R. Rep. No. 95-595, 95th Cong., 2d Sess. 61 (1978), *reprinted in*, 1978 U.S.C.C.A.N. 5787, 5847. Thus, for instance, the filing of a bankruptcy petition immediately stays all actions by creditors to enforce their debts outside the bankruptcy court. 11 U.S.C. § 362. Similarly, creditors must file their claims in a time, place and manner specified by the Bankruptcy Code and Rules or such claims are not allowed. 11

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[8] Pursuant to Article I, Section 8 of the United States Constitution, "Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States. . . ." U.S. Const. art. I, § 8, cl. 4.

U.S.C. § 501; Fed. R. Bankr. P. 3002(a). Finally, creditors and interest holders may receive only the distribution provided under the Bankruptcy Code.

An integral part of the Bankruptcy Code's scheme for considering and treating claims of creditors and interest holders is the detailed procedure for the approval of disclosure statements and plans of reorganization. As the Court of Appeals noted, "the statute itself points to the importance of a single, definitive approval process," which necessitates that challenges based on the adequacy of disclosure be brought at the time and in the manner prescribed by the Bankruptcy Code and Rules. *Kaufman v. Public Serv. Co.*, 43 F.3d at 768. A bankruptcy court's determination as to the adequacy of information contained in a disclosure statement is governed exclusively by bankruptcy law, not the registration and disclosure requirements of the Securities Acts of 1933 or 1934 or any other nonbankruptcy law, rule or regulation. 11 U.S.C. § 1125(d); *Public Serv. Co. v. Consolidated Utils. & Communications, Inc.*, 846 F.2d 803, 808 (1st Cir. 1988). Moreover, the various United States Courts of Appeal agree that "[a]n order confirming a Chapter 11 reorganization plan may be revoked *only* in accordance with [Section 1144 of the Bankruptcy Code]." *Dale C. Eckert Corp. v. Orange Tree Assocs., Ltd. (In re Orange Tree Assocs., Ltd.)*, 961 F.2d 1445, 1447 (9th Cir. 1992) (emphasis added) (citing *In re Longardner & Assocs., Inc.*, 855 F.2d 455, 460 (7th Cir. 1988); *In re Newport Harbor Assocs.*, 589 F.2d 20, 22 (1st Cir. 1978)).

Against the background of these provisions and the policies of Chapter 11, interest holders who actively participated in hearings on approval of a disclosure statement and then on confirmation of a plan of reorganization must be precluded from challenging the adequacy of the disclosure statement in another

forum based on alleged inaccuracies that were or could have been litigated in the bankruptcy court. "Subjecting a bankruptcy court's findings to subsequent collateral attack in another forum would undermine the efficacy of reorganization plans and 'would run counter to the important policy favoring finality in bankruptcy proceedings.'"[9] *Richards v. Public Serv. Co. (In re Public Service Co.)*, 848 F. Supp. 318, 324 (D.N.H. 1994) (quoting *Rochman v. Northeast Utils. Serv. Co. (In re Public Serv. Co.)*, 963 F.2d 469, 474 (1st Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 304 (1992)); *see also Henderson v. Kibbe*, 431 U.S. 145, 154 n.13 (1977) ("The strong interest in preserving the finality of judgments, as well as the interest in orderly trial procedure, must be overcome before collateral relief can be justified.") (citations omitted). As the Bankruptcy Court so aptly pointed out:

> it does not seem rational to permit full litigation of alleged inadequacies and misrepresentations in disclosure during the course of extensive disclosure statement hearings, leading to a

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[9] Despite Petitioners' protestations that they do not seek to disturb the confirmation order and that the Southern District Complaint sets forth a totally separate action with a separate purpose, (*see* Petition for Writ of Certiorari at 6-7), the threatened litigation is nothing more than a collateral attack on the Bankruptcy Court's Judgment. "'A collateral attack is an attempt to impeach the judgment by matters dehors the record, in an action other than that in which it was rendered; an attempt to avoid, defeat, or evade it, or deny its force and effect in some incidental proceeding not provided by law for the express purpose of attacking it. . . .'" *Trustees of Somerset Academy v. Picher*, 90 F.2d 741, 744 (1st Cir.), *cert. denied*, 302 U.S. 737 (1937) (citation omitted). Even though the collateral attack states an independent purpose and appears to allege a separate cause of action, if it has the effect of impeaching or overturning a prior judgment, it is still an impermissible collateral attack. *Id.* This sort of challenge may be mounted *only* on direct appeal. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981).

> contested and fully-litigated confirmation hearing resulting in success for the plan proponents with findings of compliance with the Bankruptcy Code and good faith on the part of the plan proponents, and still let the defeated litigants blithely "start all over again" asserting the same basic contentions in post-confirmation litigation against the plan proponents outside the bankruptcy court forum.

Public Serv. Co. v. Richards, 148 B.R. at 720. Bankruptcy Judge Yacos' words are especially telling, coming as they did in describing a plan of reorganization that required investments from the public of more than $2.3 billion to resolve one of the most complex bankruptcies in history. Because Petitioners had a full and fair opportunity to participate and, in fact, did vigorously participate in the congressionally mandated processes for approving the Disclosure Statement and confirming the Plan, having lost, they cannot now be allowed to revisit these issues in another forum.

The Bankruptcy Court's conclusion is fully consistent with the goals and policy behind the doctrine of preclusion. Nevertheless, Petitioners assert that the dismissal of their appeal from the Confirmation Order was due to their *inability* to have their appeal heard before the Plan was consummated and, therefore, preclusion should not bar the claims they again seek to pursue. Petitioners' argument, however, is contrary to the express finding of the First Circuit, which, in dismissing their appeal from the Confirmation Order, stated that Petitioners "were 'at fault' by failing to seek a stay of the Confirmation Order which 'allowed performance under the PSNH reorganization plan to proceed to a point well beyond any practicable appellate annulment.'" *Richards v. Public Serv.*

Co., 848 F. Supp. at 326-27 (quoting *Rochman v. Northeast Utils. Serv. Group (In re Public Service Co.)*, 963 F.2d 469, 473 (1st Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 304 (1992)).[10] Moreover, the mere fact that a party diligently seeks a stay pending appeal from a bankruptcy court's plan confirmation order does not justify a collateral attack upon a plan that is substantially consummated. *Cf. Manges v. Seattle-First Nat'l Bank (In re Manges)*, 29 F.3d 1034, 1040 (5th Cir. 1994), *cert. denied*, __ U.S. __, 115 S. Ct. 1105 (1995) (holding that the mere fact that a party diligently seeks a stay pending appeal will not preserve right to a merits review).

Similar to the decision by the Eighth Circuit Court of Appeals in *Yell Forestry Prods., Inc. v. First State Bank*, 853 F.2d 582, 584 (8th Cir. 1988), the Bankruptcy Court correctly held that Section 1125(e) barred Petitioners' threatened claims. Consistent with the policy of Section 1125(e), "[t]o permit post-confirmation further litigation against the plan proponents on these facts . . . would have a chilling effect upon participation by [various professionals and participants] essential to successful reorganization proceedings under Chapter 11 of the Bankruptcy Code." *Public Serv. Co. v. Richards*, 148 B.R. at 721.[11] Having foregone an appeal from the Bankruptcy Court's

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[10] Given the First Circuit's finding that Petitioners were "at fault," Petitioners' reliance on *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, __ U.S. __, 115 S. Ct. 386 (1994), is misplaced. (*See* Petition at 59).

[11] Judge Yacos' concern about secret frauds in the bankruptcy process is addressed by the language of the Bankruptcy Code which balances the need for finality with the need to protect against fraud in the confirmation process. Parties claiming to have been injured by secret frauds in the confirmation process have 180 days in which to challenge a confirmation order allegedly procured by fraud, pursuant to Section 1144 of the Bankruptcy Code. *Dale*

Order approving the Disclosure Statement and having failed to pursue with diligence a stay of the Confirmation Order, Petitioners are precluded from trying to revivify those long dead claims in a new action.

C. Eckert Corp. v. Orange Tree Assocs., Ltd. (In re Orange Tree Assocs., Ltd.), 961 F.2d 1445, 1447 (9th Cir. 1992). All of the facts constituting the fraud alleged by Petitioners were known to them within the 180-day period. Nevertheless, Petitioners chose to bring their challenge outside that statute of limitations, twice. Petitioners' failure to "'recognize' the significance of the alleged misrepresentation until later is insufficient to excuse their tardiness." *Richards v. Public Serv. Co.*, 848 F. Supp. at 325. More importantly, both Bankruptcy Judge Yacos, who had presided over this case for almost five years, and the First Circuit expressly concluded that "[t]here is no secret fraud here." *Kaufman v. Public Serv. Co.*, 43 F.3d at 767; *see also Public Serv. Co. v. Richards*, 148 B.R. at 720.

CONCLUSION

For the reasons set forth above, Respondents request that the petition for writ of certiorari to the United States Court of Appeals for the First Circuit be denied.

Respectfully submitted,

Respondents, PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE AND THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS,

By: John B. Nolan
Counsel of Record
Steven M. Greenspan
Gary M. Becker
Kent I. Scott-Smith
Day, Berry & Howard
CityPlace I
Hartford, CT 06103-3499
(203) 275-0100

Howard J. Berman
Greenberg, Traurig, Hoffman,
Lipoff, Rosen & Quentel
153 East 53rd Street
New York, NY 10022

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